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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.649 OF 2007

Standard Chartered Bank)
incorporated by Royal Charter)
under the provisions of the)
Laws of England and Wales,)
carrying on banking business)
in India and having one of its)
branches at 23/35, Mahatma)
Gandhi Road, Mumbai-400 023.)..PETITIONER

Vs.

1.Union of India through Govt.)
Pleader having their office at)
Ikar Bhavan, Bombay-20.)
2.Mr. K.N. Nageshwar Rao,)
Special Director of Enforcement)
having his office at Janmabhoomi)
Chambers, 1st Floor, Walchand)
Marg,Mumbai-400 001.)..RESPONDENTS

Mr. Mahesh Jethmalani, Senior Counsel with Mr. T.K. Cooper and Mr. H.D. Petit i/b.Vigil Juris for the petitioners

Mr.M.I.Sethna, Senior Counsel with Mr. A.S. Rao, Mr. A.M. Sethna and Mr. S.D. Bhosale, for the Respondents.

CORAM: F.I. REBELLO &
J.P.DEVADHAR,JJ.
DATED: 27TH JULY,2007

JUDGMENT (PER F.I. REBELLO, J.)

. Rule. Heard forthwith.

2. Adjudication proceedings have been commenced against the petitioner herein on the ground of infraction of provisions of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to "FERA". The petitioner herein in the pending proceedings raised preliminary objection that the alleged acts of contravention under the FERA pertained to the period 1991-92. The show cause notices were issued against the petitioners in 1990-94. The hearings were held between August and November, 1997 before the Adjudicating Officer, who had heard the matter and concluded the hearing as far back as in November, 1997. Even though the hearings on the show cause notice stood concluded in November, 1997 no decision was rendered thereon by the Adjudicating Officer. The revival of the

proceedings by notice received on 31st July, 2006 is bad as it would occasion serious detriment and prejudice to the petitioners on account of long passage of time and would be clearly violative of natural justice and would consequently be void. It was further set out that the employees of the petitioner who were charged for the alleged acts of contravention under the FERA have since died or resigned or retired from the service of the petitioner and except for two employees are not in the employment of the petitioners. The petitioners have also no whereabouts of the employees who retired or resigned. It is also pointed out that the records pertaining to the transaction relating to the said show cause notice are not traceable and in the absence of the relevant records the applicants ability to defend their case effectively would be hampered. The delay, it is submitted, was solely attributable to the Department and due to no fault of the petitioners. It was set out that it is now well settled by judicial pronouncements that the stale matter cannot be allowed to be reopened. Reliance was placed on various judgments.

3. The learned Authority on these objections recorded its findings in para.6 and set out the history of the proceedings from the issue of the show cause notice. The learned Authority from the

facts narrated held that the matter relating to the case of the petitioners and others were being adjudicated in various Courts of law right from the year 1994 and the Department had been filing various applications/petitions. Hearing had taken place in this Court as also the Supreme Court of India at various stages. It was noted that the case of the petitioners themselves was that the personal hearings were completed in November, 1997 before his predecessor. The personal hearings in respect of the four noticees i.e. the employees of the bank were not completed as they had filed petitions in the High Court or in the Supreme Court. It was, therefore, not possible to complete the adjudication in respect of those show causes notices as personal hearings to the four noticees were pending. The Adjudicating Authority, therefore, recorded the finding that it cannot be held that the Department had been inactive in the matter for so many years after issuing the show cause notice. Dealing with the contention that there was no stay against the petitioners herein the Adjudicating Authority noted that there were 20 notices issued to the Chartered Bank and its employees alone and another 137 show cause notices issued to various banks and its employees and others in this Vostro Group cases. As the personal hearing in respect of the employees of the petitioner were pending which form an

inseparable part of the show cause notice the Adjudicating Authority could not have passed an order in the matter as they were interconnected and interrelated and could not be decided in isolation. The Adjudicating Authority further recorded that the adjudication proceedings initiated against the employees of the petitioners had a direct bearing on the outcome of the cases against the petitioners particularly when they were being charged in the same show cause notice. It was It was further recorded that the case against the petitioner can be decided mainly based on the statements of the charged employees and the documents submitted by them. It was observed that the bank has been charged for the contraventions committed by the employees in their capacity as employees of the petitioner, as also the employees were being charged as persons who were in charge of looking after the day-do-day activities of the bank and they have ben charged in their personal capacity as individual. It was also noted that there was stay in passing any order against the employees of the bank and as such the Adjudicating Authority was helpless and had to wait till the decision of the Honourable Supreme Court. Earlier the adjudication proceedings against the employees had been stayed by this Court. It was then pointed out that as soon as the S.L.P. filed before the Supreme Court was disposed of and the

decision received the matter was posted for fresh hearing. It is, therefore, submitted that there is no hardship or prejudice caused to the petitioners. Adverting to the contention that the records pertaining to the transaction are not traceable and the absence of the relevant record has severely hampered the case of the petitioners to defend their case effectively, the contention was rejected. The Adjudicating Authority noted that the petitioners had been the main party to the litigations since the year 1994 and the matter has attained finality only in the year 2006. The petitioners had been filing various affidavits and counter affidavits and the matter was kept alive till the disposal by the Honourable Supreme Court. It was, therefore, recorded that there is no substance in the arguments that the records were not available in the bank for the purpose of adjudication proceedings. It was set out that the bank could always apply to the Adjudication Authority for any record/documents which are in the possession of the Department. The contention that the proceedings are in violation of natural justice was considered and rejected. For the reasons set out by order dated 12th February, 2007 the Adjudicating Authority dismissed the preliminary objection. It is this order which is the subject matter of the present petition.

4. At the hearing of this petition on behalf of the petitioner their learned Counsel has principally submitted as under:-

. That considering the time lapse since first issuance of the show cause notice and the conclusion of the hearings in 1997 and reopening thereafter in 2006 by itself would indicate long delay by the respondents making the proceedings stale and in these circumstances, the respondents action in reopening of the said proceedings would be arbitrary. Reliance has been placed on various judgments to which we will advert to in the course of our discussion.

. It is next submitted that the Adjudicating Authority is acting without jurisdiction. It is submitted that from the moment the petitioners became aware that there may be infringement, necessary steps were taken to comply with the requirements. This compliance was done even before the show cause notice was issued and consequently the Adjudicating Authority is acting without jurisdiction in proceedings with the proceedings.

5. At the outset it may be set out that it is not the case of the petitioners that the Adjudicating Authority had no jurisdiction to

initiate the proceedings. The contention urged is that on account of subsequent events the Adjudicating Authority would cease to have jurisdiction. To our mind this is, therefore, not a case of want of initial jurisdiction. At the highest the argument can be that on account of subsequent events the Adjudicating Authority could not have proceeded with the adjudication. The test to be applied is, whether there was a contravention of the provisions of the Act for assumption of jurisdiction. Based on that prima facie consideration, the show cause notice has been issued. The mere fact that the illegalities were subsequently not repeated is no answer. At any rate we do not find that such an objection was raised in the preliminary objection which was raised before the Adjudicating Authority. In that light the present contention as raised has to be rejected.

6. The question really is whether the respondents consciously did not proceed with the adjudication proceedings and as such on account of the lapse of time, it can be said that the proceedings have become stale and any further continuance would be arbitrary.

. In support of the contention that the proceedings should be quashed and should not be

proceeded with the learned Counsel has principally relied on the judgment of the Division Bench of this Court in Universal Generics Pvt. Ltd. vs. Union of India, 1993 (68) E.L.T. 27 (Bom). In that case there was a delay of 10 years completion of the adjudication proceedings. The consignment of cod liver oil imported had already been cleared by importer ten years before. It was therefore, held that the show cause notice as regards confiscation of imported goods became redundant. It is in this context that the Court held that the show cause notice seeking explanation of the petitioners as to why the imported goods should not be confiscated no longer survives for consideration. It was then submitted that the Revenue should be permitted to complete the adjudication proceedings atleast for the purpose of determining whether the petitioners are liable to pay any penalty amount. The learned Bench rejected the said request on the ground firstly there was no explanation why the adjudication proceedings were not completed within 10 years and consequently imposition of penalty if at all after lapse of 10 years is not just and fair.

. Reliance was also placed in the judgment of a learned Single Judge in Bhagwandas S. Tolani vs. B.C. Aggarwal & Ors., 1983 E.L.T. 44 ((Bom.). In that case the adjudication proceedings were

restarted after 11 years. At the same time the Court noted that the position may have been different if there had been any fault on the part of the petitioner or any act of omission or collusion on his part which has resulted in long period of delay. Only in such cases should a petitioner not be permitted to take advantage of his wrong.

. We may at this stage also refer to the judgment relied upon on behalf of the petitioners in the case of The Government of India vs. The Citedal Fine Pharmaceuticals, Madras & Ors., AIR 1989 SC 1771. The Supreme Court was pleased to hold that in the absence of any period of limitation it is settled that every Authority is to exercise the power within a reasonable period. What would be reasonable period would depend upon the facts of each case. Whenever a question regarding the inordinate delay in issuance of notice of demand is raised, it would be open to the assessee to contend that it is bad on the ground of delay and it will be for the relevant officer to consider the question whether in the facts and circumstances of the case notice or demand for recovery was made within reasonable period. No hard and fast rules can be laid down in this regard as the determination of the question will depend upon the facts of each case.

. In Collector of Central Excise, New Delhi vs. Bhagsons Paint Industry (India) 2003 (158) E.L.T. 129 (S.C,.) the Supreme Court once again reiterated that there is no statutory bar to adjudicate the matter. In that case the lapse was of 9 years after the issue of show cause notice and the adjudication pertains only to the actual levy of the duty which is due to the Department and not to any levy of interest or penalty.

7. In the light of the above facts and the decisions cited, it is clear that there is no hard and fast rule as to when the proceedings can be said to be stale. It depends on the facts of each case. Can it be said that the proceedings pending before Adjudicating Authority are stale and hence liable to be quashed? It is not the case of the petitioners that the show cause notice was issued after a long lapse of time. The contention is that the hearing was concluded in 1997 and no order was passed and the proceedings are sought to be re-opened in the year 2006. This, it is submitted, is arbitrary as most of the employees who were with the petitioner are either dead have resigned or retired except for two employees and secondly the records are not available after such long time and that would hamper their defence.

8. From the facts on record we may note that the show cause notice was first issued to the petitioner on 25th June, 1993. The petitioner filed Writ Petition No.509 of 1994 before this Court. An interim order came to be passed on 15th March, 1994 which reads as under:-

> "Pending the hearing and final disposal of the petition, the 1st Respondent may proceed with the Opportunity notices issued to the Petitioners and take a decision after hearing the Petitioners. If it is decided to launch prosecutions no complaints shall be filed until the disposal of the adjudication proceedings."

The Writ Petition filed by the petitioner, it may be clarified was to challenge the constitutional validity of the provisions for prosecution which came to be disposed of along with another Writ Petition by common judgment dated 7th November, 1998. Against that order Special Leave Petitions were preferred by the petitioners and it also appears that by some officers. Various reliefs had been prayed. On 7th December, 1998 the Honourable Supreme Court was pleased to pass the following order:-

> "Issue notice. Pending further orders, the prosecutions and adjudications against the officers of the petitioners shall not be proceeded with further."

Leave was granted on 22nd March, 1999 with further order that "pending the disposal of the appeals, the prosecutions or adjudications against the officers of the appellants shall not be proceeded with further." The Appeals before the Supreme Court were disposed of by judgment dated 24th February, 2006. One of the reliefs was in respect of seeking writ of prohibition, discussion of which can be found in para.23. The prohibition sought was to restrain the authorities under the Act from proceeding with the adjudication. The other challenge was to the constitutional validity. The Court noted that once it is held that the provisions are Constitutional the basis on which the writ of prohibition is sought for by the appellants disappears. The Supreme Court was also pleased to observe as under:-

> " On the facts of this case, it cannot be said that these notices are palpably without authority of law."

The issue of prosecution of the employees of the company was also considered. The Court was pleased

to hold that the Company can be proceeded with under Section 68 both in the matter of adjudication proceedings as well as contravention. Admittedly along with the show cause notice issued to the Company show cause notices were also issued to the employees.

9. There is no dispute that in so far as the petitioner is concerned the personal hearing was given in November, 1997. After the interim order of the Supreme Court, the respondents herein had moved various applications for variation of the order. Those applications were either withdrawn or the reliefs as prayed for were not granted. In the affidavit filed by A.G. Wasnik, Assistant Director the various steps taken have been set out and the applications/orders are annexed.

. The stand of the respondents has been that it was not possible to proceed with the proceedings for adjudication alone against the petitioner without continuing with the proceedings against the employees. It cannot be said that this contention of the respondents is not bonafide or devoid of merit. The petitioners also throughout the pendency of the proceedings before this Court or the Supreme Court did not challenge the continuance of the proceedings on the ground that they were stale or

that the hearing had been concluded in 1997 On the contrary as observed by us earlier before the Supreme Court one of the reliefs which was sought was a writ by way of prohibition which was rejected. In other words the petitioners were conscious of the fact that there was no act or omission on the part of the Respondent Authorities or that their conduct was blameworthy resulting in infringing the rights of the petitioner on account of long delay. In so far as the documents are concerned as rightly pointed out on behalf of the Adjudication authority, the petitioners had filed the petitions and the various affidavits which had been filed could have only been based on the records which are available. They were fully aware of the proceedings pending before the adjudication proceedings. In this context to contend that they would be handicapped in defending the proceedings to our mind is an after and totally devoid of merit. The fact that some employees have retired or resigned and are not available also can be no ground considering that the proceedings have been pending in the Court right from the year 1994 i.e. after the show cause notices were issued. The A.O. has further stated that it is open to them to apply for records available with them if required. At any rate if records are lost the petitioners cannot take advantage of their own wrong as they were aware that

the proceedings were pending. That is one of the facts to be considered as noted by the Supreme Court in the case of The Government of India vs. The Citedal Fine Pharmaceuticals, Madras & Ors (supra).

10. For the aforesaid reasons we find no merit in this petition. Petition dismissed. Rule discharged. No order as to costs.

2. Learned Counsel seeks stay of the above order. In our opinion no case is made out for stay. Hence application for stay is rejected.

3. Learned Counsel seeks four weeks time to file additional reply as earlier reply was filed many years ago. Considering the request petitioners are granted additional time of four weeks to file their additional reply.

(J.P. DEVADHAR, J.) **(F.I.REBELLO, J.)**